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No. 02-1667

In The Supreme Court of the United States

STATE OF TENNESSEE,

Petitioner,

v.

GEORGE LANE, BEVERLY JONES, and UNITED STATES OF AMERICA,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITIONER'S REPLY BRIEF

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ARGUMENT

Respondents Lane and Jones assert that the validity of Title II's abrogation of the States' sovereign immunity should be considered on a case-by-case basis and must be sustained "so long as Congress had the power to reach the particular factual context before the Court." Lane Br. 36. Although they nowhere dispute that Title II forbids a vast array of state policies and practices that do not violate the Fourteenth Amendment rights of disabled persons, Lane and Jones contend that Title II is nevertheless proper section 5 enforcement legislation as applied in "the courthouse access context" presented by their case, because Title II operates in that narrow sphere as "a 'reasonably prophylactic' measure" designed to eliminate "[t]he threat to constitutional rights posed by inaccessible courts. . . ." Lane Br. 20, 28 & 34-40. By contrast, the United States attempts to defend the indiscriminate sweep of Title II in its entirety, arguing that a context-specific approach such as that endorsed by the private respondents "is not the model this Court has applied" in prior abrogation cases and is "at odds with this Court's congruence and proportionality test for evaluating Section 5 legislation," which "necessarily entails looking at a statutory provision's overall operation and coverage. . . . " U.S. Br. 39.

In petitioner's view, either mode of analysis leads to the same conclusion. Title II of the Americans with Disabilities Act exceeds Congress' enforcement authority under section 5 of the Fourteenth Amendment.

I. TITLE II, AS APPLIED IN THE COURTHOUSE ACCESS CONTEXT, IS NOT VALID SECTION 5 LEGISLATION.

A. It must be emphasized at the outset that the particular allegations of the Complaint filed in this case do not reveal any violation of the constitutional rights of respondents Lane or Jones.[1] As for respondent Lane, the Complaint acknowledges that he was in fact able to attend his initial appearance in person to hear the criminal charges filed against him, despite the barrier presented by the staircase leading to the second-floor courtroom in the Polk County Courthouse in Benton. Pet. App. 15. He does not claim that court personnel refused him assistance to negotiate the stairs on this occasion. From all that appears on the face of the Complaint, he never requested such assistance or asked that the hearing be relocated to accommodate him.

The Complaint further makes it clear that Lane's subsequent arrest for failure to appear at his next scheduled hearing occurred only after he willfully refused assistance from officers dispatched by the court to help him to the courtroom. Pet. App. 15. Lane suggests for the

[1] The private respondents' brief in this Court discusses at some length allegations made by persons other than Lane and Jones. Lane Br. 6 & 14. These individuals (identified as Ann Marie Zappola, Ralph E. Ramsey, Sr., Dennis Cantrel, and A. Russell Larson) were apparently added to the lawsuit as plaintiffs before the district court while petitioner's appeal of the denial of its motion to dismiss the original complaint was pending. The amended complaint is not part of the record on appeal; these additional plaintiffs were never made parties to the appeal in the Sixth Circuit; and, accordingly, they are not before this Court.

first time in this Court that he was privileged to defy the court's order to appear because he should not have been required to "put his safety at risk by allowing court employees to carry hir[1]" up the stairs to the courtroom. Lane Br. 5. But no such safety concerns are mentioned in the Complaint, and none are otherwise borne out by this record. Moreover, Lane cites no authority for the extraordinary proposition that the Constitution (or Title II, for that matter) excuses disabled persons from the duty to obey the lawful orders of a court when the court itself makes available to them the means to comply.

The Complaint also discloses that the court conducted Lane's preliminary hearing in a fully accessible library located on the first floor of the courthouse in Benton, albeit over Lane's objection. Pet. App. 16. Lane claims in this Court (again, for the first time) that he objected to the use of the library because it was not "generally accessible to the public." Lane Br. 30 n.15. But his Complaint alleges merely that the library was "not *frequented* by the public." Pet. App. 16 (emphasis added). There is a difference. The constitutional command of open judicial proceedings has never been understood to require the States to provide courtrooms that are "frequented by the public." *See generally Richmond Newspapers, Inc. v. Virginia,* 448 U.S. 555 (1980).

The trial court's order denying Lane's motion to dismiss made at his next hearing, conducted on the second floor of the courthouse in Benton, reveals that the court offered to relocate all further proceedings in the case to the modern, handicap-accessible courthouse in nearby

Ducktown.[2] Lane now for the first time seeks to justify his refusal to accept that offer by claiming that such an accommodation would have required him to forfeit his state constitutional right to be tried "in the county in which he was charged." Lane Br. 30 n.15. However, because Ducktown and Benton are located in the same county – Polk County[3] – the court's offer did not implicate Lane's rights under the Tennessee Constitution.

Finally, the allegations of the Complaint admit that the presiding judge of the judicial district ultimately stayed all proceedings in criminal cases at the Benton courthouse, including in Lane's case, until an elevator could be installed in the building. An elevator was in fact installed in June 1998. Pet. App. 17. Plainly, Lane was not deprived of any constitutional right as a consequence of the architectural barriers at the Benton courthouse.

Neither was respondent Jones. She is a certified court reporter, and she alleges that she requires access to the various courthouses at issue here "for the purpose of supporting herself and her family by being allowed to attend court proceedings and transcribing those proceedings." Pet. App. 13. There is no fundamental right to earn one's living as a court reporter. Thus, to make out an equal

[2] *State v. Lane,* Nos. 97-016, 97-017 (Polk County, Tenn., Criminal Court) (order denying motion to dismiss entered April 15, 1997), *aff'd,* C.C.A. No. 03COA-9704-CR-00158 (Tenn. Sept. 2, 1997). Pursuant to Rule 32 of the Rules of this Court, petitioner has submitted a request to the Clerk to lodge a certified copy of this Order along with other documents in Lane's criminal case on file in the Tennessee Supreme Court. Pet. Br. 8 n.1.

[3] OFFICAL TENNESSEE TRANSPORTATION MAP (2004) D-12 (available at http://www.tdot.state.tn.us/maps/front.pdf).

protection violation under the circumstances alleged in the Complaint, Jones at the very least would be required to plead and prove that the various counties' failure to retrofit their courthouses to accommodate her disability was either wholly irrational or intentionally calculated to stigmatize disabled persons. *But see Board of Trustees of the Univ. of Alabama v. Garrett,* 531 U.S. 356, 368 (2001) ("If special accommodations for the disabled are to be required, they have to come from positive law and not through the Equal Protection Clause."). She has made no such allegation in this case, however.

B. To be sure, as observed by respondents and their amici, the courthouse is a venue where a number of fundamental constitutional rights may be exercised and enforced. For example, the Constitution requires that judicial proceedings be open to the public, *Richmond Newspapers, Inc.,* 448 U.S. at 555; *Waller v. Georgia*, 467 U.S. 39 (1984); defendants in criminal cases have a constitutional right to be present at all critical stages of the trial, *Faretta v. California,* 422 U.S. 806 (1975); and civil litigants must be afforded an equal opportunity to present their claims to the courts, *Boddie v. Connecticut,* 401 U.S. 371 (1971). But identifying the set of constitutional rights purportedly protected by section 5 enforcement legislation is only the first step in the analysis. Before invoking its section 5 powers to abrogate state sovereign immunity, Congress must have before it evidence of a "widespread and persisting deprivation of . . . [those] rights" by the States. *City of Boerne v. Flores,* 521 U.S. 507, 525 (1997). The requirement that Congress base section 5 legislation upon a well-documented record of unconstitutional behavior by the States has not been relaxed by this Court in prior cases merely because the set of constitutional interests

implicated by the legislation were deemed to be "fundamental" or otherwise qualified for "heightened" protection by the courts. *See, e.g., City of Boerne,* 521 U.S. at 529 (free exercise rights guaranteed by the First Amendment); *Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank,* 527 U.S. 627 (1999) (right to be free from state deprivations of property rights without due process); *Nevada Dep't of Human Res. v. Hibbs,* 538 U.S. 721, 123 S. Ct. 1972 (2003) (right to be free from gender-based discrimination unnecessary to the achievement of important governmental objectives).

There was no proof in the record before the Congress that enacted the ADA that the States were engaged in a pattern of violating the constitutional rights of disabled persons at courthouses across the country. Perhaps most tellingly, although that Congress had the benefit of "more than forty years of experience studying the scope and nature of discrimination against persons with disabilities," U.S. Br. 15, the House and Senate Reports on the legislation do not contain even a single reference to problems encountered by disabled persons in gaining meaningful access to the courts. *See generally* H.R. REP. NO. 101-485(IV), 101st Cong., 2d Sess. (1990), *reprinted in* 1990 U.S.C.C.A.N. 512; S. REP. NO. 101-116, 101st Cong., 1st Sess. (1989). Nor does the text of the legislation itself reflect that courthouse access was a matter of concern. The substantive provisions of the ADA do not mention the subject. And, although Congress took the trouble in its formal statement of "Findings and purpose" to identify specific areas in which it believed disability discrimination to be a problem, *e.g.*, in "employment, housing, public accommodations, education, . . . and access to public services," 42 U.S.C. § 12101(a)(3), it did not see fit to include "access to the justice system" or "unconstitutional treatment by the courts" in that list.

The only bit of testimonial evidence concerning courthouse access issues gleaned by respondents from the voluminous legislative record consists of a single story recounted by a witness named Emeka Nwojke. She described the considerable difficulties she experienced overcoming numerous architectural barriers on her way to a court proceeding, only to be treated rudely by court personnel and the judge when she finally arrived. U.S. Br. 21-22. As inexcusable as that incident may have been (and petitioner offers no excuses for it), respondents certainly must concede that Ms. Nwojke's story does not reflect the occurrence of any constitutional violation.[4]

C. Respondents and their amici have likewise failed to make a persuasive case outside the legislative record

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[4] The unsubstantiated anecdotes contained in the Task Force Report lodged with this Court in *Garrett,* 531 U.S. at 391-424 (Breyer, J., dissenting), do not establish any widespread pattern of unconstitutional behavior by the States in the courthouse context. *See* U.S. Br. 22 n.14. The vast majority of the pertinent entries in the Report merely label one or more court facilities in a particular jurisdiction "inaccessible" but do not document the occurrence of any constitutional violations at those facilities. *See, e.g.,* CA 254 (handwritten statement about "intermittent inaccessibility of County Court" due to faulty elevators); MA 812 (photo and news article of person in wheelchair being carried up steps in order to testify; no indication she was unable to testify). The few such entries that contain any detail whatsoever consist almost entirely of unsworn hearsay accounts and, like Ms. Nwojke's account, do not permit any conclusion that the incident described involved a constitutional violation by a State. *E.g.*, AL 15 (statement from Alabama employee regarding incident at an unidentifed courthouse related by an unnamed caller; no indication that witness involved was unable to testify.)

that the States are guilty of depriving disabled persons of meaningful access to the courts, either now or in the past. They rely principally on the fact that too many courthouses across the country have yet to eliminate architectural barriers which undoubtedly make physical access to courtrooms and clerk's offices more onerous for disabled citizens than for others. But respondents and their amici have presented *no evidence* that such barriers have caused the violation of anyone's constitutional rights. Indeed, in the hundreds of pages of briefs filed in this Court by respondents and their amici, there does not appear a single citation to case law from any jurisdiction in which it appears that a disabled criminal defendant was unconstitutionally excluded from access to a critical stage of his trial by such barriers; or in which a disabled civil litigant was held to have been unconstitutionally denied the right to pursue his claims as the result of such barriers; or in which such barriers were held to have prevented a disabled member of the public from attending judicial proceedings in violation of the Constitution's public trial guarantee.[8] Nor do the Department of Justice's quarterly reports concerning its Title II compliance investigations of courthouse facilities document any such instances. Those reports reveal only that architectural barriers continue to exist at courthouses in many localities. They do not establish that a pattern of constitutional violations has occurred at those facilities. As respondent Lane's experience illustrates

[8] The handful of cases addressing courthouse access issues cited by the private respondents, Lane Br. 24 & n.13, do not contain any findings of constitutional violations by the States but instead address violations of the statutory access requirements imposed by the Rehabilitation Act and Title II of the ADA.

(*supra* pp. 2-4), the presence of such barriers does not inevitably, or even probably, pose any real threat to the constitutional rights of disabled persons.

The evidence offered by respondents that the States unconstitutionally exclude disabled persons from participation in other aspects of the judicial process is also flimsy. Its weakness is typified by the United States' egregious misstatement concerning the rules governing jury service in Tennessee. U.S. Br. 23-24 ("Yet, to this day, petitioner continues to prohibit the 'physically disabled' from serving as jurors."). The fact of the matter is that all citizens over the age of 18 are liable to be summoned to jury service in Tennessee. TENN. CODE ANN. § 22-1-101 (1994 Repl.). Persons "disabled by bodily infirmity," TENN. CODE ANN. § 22-1-103(a)(5) (1994 Repl. & 2003 Supp.), or "not in the full possession of the senses of hearing or seeing," TENN. CODE ANN. § 22-1-103(a)(7) (1994 Repl. & 2003 Supp.), may claim a limited exemption from liability to act as jurors, but it is up to them to claim the exemption. *See* TENN. CODE ANN. § 22-1-103(c) (1994 Repl. & 2003 Supp.). Once summoned, "[p]ersons of unsound mind and habitual drunkards" are excluded from actual service on a jury. TENN. CODE ANN. § 22-1-102(a)(4) (1994 Repl.). But a hearing- or sight-impaired person may be excluded from such service only if the court makes an individualized determination "that such person cannot provide adequate service as a juror on such jury." TENN. CODE ANN. § 22-1-102(b) (1994 Repl.). Thus, the charge that Tennessee's

juror qualification statutes unconstitutionally discriminate against individuals with disabilities is false.[6]

Other proof offered by the United States for the proposition that the States were unconstitutionally excluding the disabled from jury service in 1990 when Congress enacted the ADA consists of a 1948 Oklahoma judicial decision, a Louisiana statute repealed in 1966, and a Florida statute repealed in 1979. U.S. Br. 24 n.16. Obviously, none of these materials can supply an adequate predicate for Title II as applied in this context. Nor can the Arkansas statute, which until 1994 excluded potential jurors whose hearing or sight was "substantially impaired,"[7] or the 1985 Missouri court decision, which approved a similar exclusion. *Id.* This Court has never held that the Constitution requires the States to make special accommodations for prospective jurors who are unable to hear oral testimony or unable to see documentary evidence.[8]

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[6] The Tennessee statute cited by the United States as authority for its baseless charge permits the county board of jury commissioners to put aside the names of persons drawn from the jury box "known to the board to have died, removed from the county, or become mentally or physically disabled *for jury service.*" TENN. CODE ANN. § 22-2-304(d)(1) (1994 Repl.) (emphasis added). Thus, the statute permits the removal of the names of only those persons "disabled for jury service," not, as the United States would have it, the names of all persons with disabilities.

[7] The constitutionality of the Arkansas statute in question was upheld in *Eckstein v. Kirby*, 452 F. Supp. 1235 (E.D. Ark. 1978).

[8] To the contrary, "[p]arties may ... exercise their peremptory challenges to remove from the venire any group ... normally subject to 'rational basis' review." *J.E.B. v. Alabama ex rel. T. B.*, 511 U.S. 127, 143 (1994) (citing *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 446 (1985)).

D. Given the dearth of evidence that the States have been involved in any pattern of unconstitutional discrimination against the disabled in the administration of their justice systems, this Court's decision in *Hibbs* lends no support to the private respondents' claim that Title II, as applied in that discrete context, may be defended as appropriately congruent and proportional section 5 prophylaxis. The Family and Medical Leave Act sustained in *Hibbs* was enacted against the backdrop of a "long and extensive history of sex discrimination" by the States in the workplace, *Hibbs,* 123 S. Ct. at 1979, and was supported by a detailed factual "record of [their] unconstitutional participation in, and fostering of, gender-based discrimination in the administration of leave benefits." *Id.* at 1981. Here, by contrast, the threat to fundamental constitutional rights conjured up by the private respondents in the courthouse context is entirely hypothetical. While it may be "easier for Congress to show a pattern of state constitutional violations" when the target is state action that "triggers a heightened level of scrutiny," *id.* at 1982, *Hibbs* makes clear that a pattern of misconduct must nevertheless be demonstrated. *Hibbs* does not suggest that Congress may invoke its section 5 authority to stamp out the threat of constitutional violations it has no reason to believe are occurring.

II. TITLE II, VIEWED IN ITS ENTIRETY, IS NOT VALID SECTION 5 LEGISLATION.

A. For the most part the United States does not address petitioner's central contention – that Title II, considered in its entirety, fails the congruence and proportionality test of valid section 5 legislation because its sheer breadth "is so out of proportion to ... [its] supposed

remedial or preventive object," *City of Boerne*, 521 U.S. at 532, that it can only be viewed as an attempt by "Congress to rewrite the Fourteenth Amendment law laid down by this Court in *Cleburne*." *Garrett*, 531 U.S. at 374. Although section 5 mandates that Congress "must tailor its legislative scheme to remedying or preventing" a documented pattern of state "conduct transgressing the Fourteenth Amendment's substantive provisions," *Florida Prepaid*, 527 U.S. at 639, the case law under Title II since its enactment confirms beyond dispute that most of the conduct regulated by the statute does not even remotely implicate the constitutional rights of disabled persons.[9]

B. Ignoring the virtually limitless variety of contexts in which the States are forced into federal court by Title II

[9] *See, e.g.*, *Chaffin v. Kansas State Fair Bd.*, 348 F.3d 850 (10th Cir. 2003) (failure to provide meaningful access for disabled persons to attend concert at the state fair); *Shepard v. Irving*, 77 Fed. Appx. 615 (4th Cir. 2003) (disabled student seeks expungement of "F" grade and of plagiarism conviction); *Keirnan v. Utah Transit Auth.*, 339 F.3d 1217 (10th Cir. 2003) (disabled bus rider sues state transit authority for failure to accommodate wheelchair that exceeded size and weight of common wheelchair); *Thomas v. Nakatani*, 309 F.3d 1203 (9th Cir. 2002) (deaf traveler sues Hawaii for quarantining guide dog upon entry into state); *Wroncy v. Oregon Dep't of Transp.*, 9 Fed. Appx. 604 (9th Cir. 2001) (plaintiff disabled by extreme sensitivity to herbicides sues on account of state's refusal to stop spraying weed killer along public roads near her home); *Thompson v. Colorado*, 278 F.3d 1020 (10th Cir. 2001) (state prohibited by Title II from charging fee for handicapped parking placards), *cert. denied*, 535 U.S. 1077 (2002); *Parker v. Universidad de Puerto Rico*, 225 F.3d 1 (1st Cir. 2000) (disabled plaintiff sues public university for defects in wheelchair path resulting in unsafe access to campus gardens); *Bowers v. National Collegiate Athletic Ass'n*, 9 F. Supp. 2d 460 (D.N.J. 1998) (learning-disabled student claims Title II violation by public university which declared him academically ineligible to play college football).

to defend entirely constitutional behavior, the United States chooses instead to highlight Title II's coverage in a few areas where it is claimed that Congress sufficiently identified a pattern of "state conduct [that] interferes with or threatens the fundamental rights of individuals with disabilities." U.S. Br. 36. An objective assessment of the legislative record belies that claim, however.

Deliberate persecution of disabled persons. Practices of the distant past long since abandoned – the eugenics movement, compulsory sterilization, "ugly laws," the total exclusion of handicapped children from public education, and the "torture, imprisonment and execution of handicapped people," U.S. Br. 18-19 – do not supply an adequate predicate for the enactment of Title II for the same reason they were rejected by this Court in *Garrett* as a justification for Title I of the statute: "[T]here is no indication that any State had persisted in . . . such harsh measures as of 1990 when the ADA was adopted." *Garrett*, 531 U.S. at 369 n.6. *See also City of Boerne*, 521 U.S. at 530 ("RFRA's legislative record lacks examples of modern instances of generally applicable laws passed because of religious bigotry.").

Access to the courts and participation in the justice system. As petitioner has demonstrated, *supra* at pp. 5-10, the evidence before Congress was plainly insufficient to demonstrate any state-sponsored pattern of unconstitutional abuse in these areas.

Voting. At the time of the passage of the ADA, there were some 43 million disabled Americans. 42 U.S.C. § 12101(a)(1). But, to establish that the States were engaged in a pattern of unconstitutional discrimination against the handicapped in voting, the United States culls

from the legislative record anecdotes from a grand total of three disabled voters who had experienced difficulties at the polls. U.S. Br. 27-28 & n.19. The United States notes that Congress also heard about disabled voters who exercised the franchise by casting absentee ballots rather than going to the polls. U.S. Br. 28. Obviously, such voters have not suffered any unconstitutional abridgement of their right to vote.

Access to government officials and proceedings. The lack of ramps, elevators and handicap-accessible seating at some state buildings – making attendance at public meetings and conferences with public officials more difficult for the disabled than for others – is by no means desirable, but neither has it ever been regarded as unconstitutional. *Cf. Minnesota State Bd. for Cmty. Colleges v. Knight*, 465 U.S. 271, 284 (1984) ("Policymaking organs in our system of government have never operated under a constitutional constraint requiring them to afford every interested member of the public an opportunity to present testimony before any policy is adopted."). Contrary to the government's suggestion, U.S. Br. 29, there is no viable analogy to be drawn between the existence of such barriers, on the one hand, and laws enacted out of a "bare . . . desire to harm a politically unpopular group. . . ," on the other. *Romer v. Evans*, 517 U.S. 620, 634 (1996) (quoting *Department of Agric. v. Moreno*, 413 U.S. 528, 534 (1973)). The design of public buildings is hostage to a number of constraints: budgetary limitations, site restrictions, security demands, aesthetic considerations, and the state of the engineering and architectural arts at the time of construction. The fact that one or more of these factors may combine to produce a structure ill-suited to the special needs of the disabled cannot logically support an

inference of discriminatory animus against such persons, any more than can the decision by L'Enfant to locate the Capitol atop Jenkins Hill.

Education. "Public education is not a 'right' granted to individuals by the Constitution." *Plyler v. Doe*, 457 U.S. 202, 221 (1982). Accordingly, mental or physical disability is a "characteristic that the government may legitimately take into account" in shaping education policy so long as the choices made are rational. *Cleburne,* 473 U.S. at 446. In the field of education, the Court has applied heightened scrutiny only to laws that inflict a "punitive discrimination based on status," *Plyler*, 457 U.S. at 240 (Powell, J., concurring), so as to "deny to a discrete group of innocent children the free public education . . . offer[ed] to other children. . . ." *Id.* at 230. When it enacted the ADA, Congress lacked any evidence that state education officials were currently pursuing such policies targeted at handicapped children. Indeed, by that time, the federal Education for All Handicapped Children Act of 1975 had been on the books for more than a decade; at least 49 States were receiving federal financial assistance under the Act, *Board of Educ. v. Rowley*, 458 U.S. 176, 183-84 (1982); and, as a condition of receiving such assistance, each one of those States had been required to demonstrate to the satisfaction of the Secretary of Education that it "ha[d] in effect a policy that assures all handicapped children the right to a free appropriate public education." *Id.* at 181 (quoting 20 U.S.C. § 1412(1)). In its effort to cobble together from the legislative record evidence of a pattern of state-sanctioned unconstitutional discrimination in education, the United States can point to only a dozen instances of mistreatment of handicapped children in all of the nation's elementary and secondary schools, each one committed by an employee of a

local school district.[10] U.S. Br. 25-26 & n.17. The number of cited instances involving such mistreatment in state institutions of higher learning is smaller still. U.S. Br. 26 & n.18. Plainly, all of "these incidents taken together fall far short of even suggesting the pattern of unconstitutional discrimination on which § 5 legislation must be based." *Garrett*, 531 U.S. at 370.

Public transportation. The Fourteenth Amendment has never been construed to confer a substantive constitutional right to public transportation. Thus, the States' activities in this field, insofar as they involve classifications based upon disability, are subject to rational basis scrutiny and are entitled to a "strong presumption of validity." *Heller v. Doe,* 509 U.S. 312, 319 (1993). Aside from a single anecdote concerning rude bus drivers in one American city and a quotation from an insensitive Connecticut transportation official, U.S. Br. 33-34, the United States offers no evidence whatsoever that Congress had reason to believe States were irrationally or invidiously discriminating against individuals with disabilities in public transportation. Without doubt, budgetary constraints have forced some transport authorities to defer purchases of new equipment designed to accommodate the

[10] The United States asserts that the Court is "not constrained, as it was in *Garrett,* to consider only the . . . evidence of unconstitutional conduct directly by the States" "because the line between state and local government is harder to discern in the context of public services than it is in employment." U.S. Br. 12. But the United States fails to identify any public service context in which this is true. Moreover, as the Court observed in *Garrett*, "[i]t would make no sense to consider constitutional violations . . . [by local governments], as well as by the States themselves, when only the States are the beneficiaries of the Eleventh Amendment." 531 U.S. at 369.

needs of disabled persons. But decisions based on such considerations are not irrational, *see Schweiker v. Wilson,* 450 U.S. 221, 238-39 (1981), and "the States are not required by the Fourteenth Amendment to make special accommodations for the disabled, so long as their actions toward such individuals are rational." *Garrett,* 531 U.S. at 367.

Licensing decisions. In this area too, state decisionmaking is presumptively constitutional; one who charges that a particular licensing determination irrationally discriminates against the disabled must "negative every conceivable basis which might support it." *Heller,* 509 U.S. at 320. The United States fails to carry that burden with respect to the sole incident discussed in the House Report on the ADA concerning discriminatory treatment in licensing. U.S. Br. 33 (denial of teaching credential to applicant stricken with polio). Similarly, the references to licensing decisions in the Task Force Report contain insufficient detail to permit any conclusion with respect to their constitutionality. U.S. Br. 33 n.26.

Zoning decisions. There was no evidence before Congress that the States were guilty of unconstitutional disability discrimination in zoning decisions at the time of the enactment of the ADA. All of the examples cited by the United States from the Task Force Report on this topic involve decisions by local government zoning agencies; none of those examples indicates that the decision involved was directed by a State or was required to implement state policy. U.S. Br. 33 & n.25.

Child custody. While Congress heard unsubstantiated allegations of discrimination against the disabled in child custody cases from two witnesses, U.S. Br. 31 & n.23, the

judicial decisions cited by the United States to buttress those charges actually undercut them. None of the cited decisions contains a finding of unconstitutional discrimination; all of them exemplify the readiness of state appellate courts to safeguard the rights of disabled persons in family law matters.[11]

Law enforcement / treatment of prisoners. All but one of the examples of police misconduct cited by the United States were committed by local, not state, officers. U.S. Br. 30. Similarly, eleven of the sixteen cases cited by the government to show a pattern of unconstitutional mistreatment of disabled prisoners by the States involve local, territorial, and federal jails[12] or do not contain any finding of a constitutional violation.[13] The handful of remaining cases do not demonstrate any widespread pattern of Eighth Amendment violations by state correctional officials.

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[11] *E.g., Stewart v. Stewart*, 521 N.E.2d 956 (Ind. Ct. App. 1988) (holding HIV infected father's visitation rights improperly terminated) (U.S. Br. App. 11a); *Moye v. Moye*, 627 P.2d 799 (Idaho 1981) (reversing custody award based on overemphasis of mother's epilepsy) (U.S. Br. App. 10a); *In re Marriage of Carney*, 598 P.2d 36 (Cal. 1979) (lower court improperly stereotyped abilities of handicapped parent) (U.S. Br. App. 10a).

[12] *E.g., Leach v. Shelby County Sheriff*, 891 F.2d 1241 (6th Cir. 1989) (county jail) (U.S. Br. App. 3a), *cert. denied*, 495 U.S. 932 (1990); *LaFaut v. Smith*, 834 F.2d 389 (4th Cir. 1987) (federal) (U.S. Br. App. 3a); *Miranda v. Munoz*, 770 F.2d 255 (1st Cir. 1985) (Puerto Rico) (U.S. Br. App. 3a); *Carty v. Farrelly*, 957 F. Supp. 727 (D.V.I. 1997) (Virgin Islands) (U.S. Br. App. 6a).

[13] *E.g., Key v. Grayson*, 179 F.3d 996 (6th Cir. 1999) (claims under ADA and Rehabilitation Act) (U.S. Br. App. 2a), *cert. denied*, 528 U.S. 1120 (2000); *Love v. Westville Corr. Ctr.*, 103 F.3d 558 (7th Cir. 1996) (claims under ADA) (U.S. Br. App. 2a).

Institutionalization. The only area in which the United States comes close to demonstrating any basis for an exercise by Congress of its section 5 authority involves the record of state institutions for the mentally and developmentally disabled. U.S. Br. 31-32; U.S. Br. App. C. That observation, however, merely serves to underscore Title II's fatal lack of congruence and proportionality. The information before Congress about conditions at such institutions in some States cannot fairly be claimed to supply an adequate predicate for Title II's application to every state building and service or for the extra-constitutional obligations it imposes on all States with regard to the vast majority of their physically and mentally disabled citizens who are not, and never have been, institutionalized.

C. In the final analysis, the government's attempt to defend Title II's breathtaking scope as an appropriately "comprehensive remedy ... [for] an all-encompassing, inter-connected problem," U.S. Br. 49-50, amounts to a frontal assault on this Court's decision in *Cleburne*. The rationale advanced by the United States in support of Title II – the need to eradicate "entrenched stereotypes, fear, prejudices, and ignorance about individuals with disabilities," U.S. Br. 46 – is the same one *Cleburne* flatly rejected as a basis for affording the handicapped heightened protection under the Fourteenth Amendment. Title II assumes that, in the administration of every facet of their "services, programs, or activities," 42 U.S.C. § 12132, "the States as governmental entities ... embody the misconceived or malicious perceptions of some of their citizens" toward the disabled. *Garrett*, 521 U.S. at 375 (Kennedy & O'Connor, JJ., concurring). Because Congress had no basis

in fact for indulging that assumption, it lacked authority under section 5 to apply Title II to the States.

CONCLUSION

For the reasons stated here and in petitioner's initial brief, the judgment of the court of appeals should be reversed.

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